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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1501

FRED BRAMBLETT,
Petitioner,

v.

WILLIAM R. DESOBRY, et al.

PETITION FOR A WRIT OF CERTIORARI

To the Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

To the Court of Appeals for the Sixth Circuit

The petitioner, Fred Bramblett, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on January 8, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit, as yet unreported, appears at Appendix A, pp. A-1-A-3, *infra*.

The opinion of the United States District Court for the Western District of Kentucky, as yet unreported, appears as Appendix B, pp. A-4-A-7, *infra*.

The action of respondent General Desobry in discharging petitioner from his employment, not reported, appears as Appendix C, pp. A-8-A-11, *infra*.

The conclusion of the report of the Appeals Examiner, recommending that petitioner be retained in employment, not reported, appears as Appendix D, pp. A-12-A-13, *infra*.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, pp. A-1-A-3, *infra*) was entered on January 8, 1974. This petition for certiorari was filed less than 90 days from the date aforesaid.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether sovereign immunity applies to a suit for judicial review of administrative action.

2. Whether the Administrative Procedure Act constitutes a waiver of sovereign immunity.

3. The proper basis on which to decide whether a government officer's act is privileged.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law;"

The judicial review sections of the Administrative Procedure Act are set forth in 5 U.S.C. §§ 701-706. These are set forth in Appendix F for general reference. In particular, § 702 (designated as § 10(a) in the original statute) provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Statutes relating to jurisdiction of Federal District Courts are set forth in Appendix F.

STATEMENT OF THE CASE

Petitioner was a federal employee. Respondent, General Desobry, discharged him from his job without proper grounds and using improper procedure. Petitioner sought review of this administrative action in the courts, in accordance with the accepted practice of the federal judiciary. The Federal District Court erroneously held that the doctrine of sovereign immunity barred the suit and granted summary judgment without considering the merits of the case.

The events took place as follows. Petitioner was the manager of the Fort Knox Rod and Gun Club, a nonappropriated-fund-activity of the Federal Government. Respondent General Desobry was the commanding general of Fort Knox. General Desobry suspended petitioner, alleging mismanagement of the Club. Under applicable administrative regulations, petitioner brought the matter before an appeals examiner. After a hearing the examiner rejected the charges and found in petitioner's favor, recommending his reinstatement. (Appendix D) Respondent Desobry refused to follow the examiner's decision and instead appointed a new *ad hoc* committee of officers to re-

port on the matter. Whereas the appeals examiner had afforded petitioner the opportunity to present evidence and defend himself, this later committee did not grant petitioner any aspect of due process. Petitioner was not even advised of its existence. Subsequently, with no explanation other than apparent reliance on the conclusions of this secretive body, General Desobry discharged petitioner from his employment.

Petitioner instituted suit against General Desobry and the Secretary of the Army in the United States District Court for the Western District of Kentucky. The suit originally sought information under the Freedom of Information Act regarding the findings of the appeals examiner and the *ad hoc* committee, which respondent had withheld from petitioner. The report of the appeals examiner exonerating petitioner was made available before an answer was filed. (No document regarding the *ad hoc* board was revealed at any time.) Petitioner then amended his complaint to seek declaratory and injunctive relief in accordance with the long recognized concept of "nonstatutory" review of administrative action.

The complaint alleged that both the substance and procedure of General Desobry's actions were in violation of the Due Process Clause, statutes, and administrative regulations. A claim was also made against General Desobry for damages resulting from his unauthorized act. Despite the demonstration of numerous issues of law and fact by petitioner, the District Court halted the action at the threshold, holding that it constituted a suit against the federal government and that sovereign immunity was therefore a bar. The claim against General Desobry was also dismissed, apparently on the basis of governmental officer privilege. On appeal to the Sixth Circuit Court of Appeals, the District Court decision was affirmed, *per curiam*, without discussion of the significant issues of the case.

Facts: Very few facts underlie the Court's decision. The Fort Knox Rod and Gun Club was held to be an instrumental-

ity of the United States. General Desobry filed an affidavit mainly devoted to interpretation of the law, with hardly any factual explanation of his actions (see Appendix E). No discovery was conducted. Respondent Desobry made a determined effort to withhold significant evidence in the case from petitioner. No stipulations were made. No hearing was held by the District Court on the motion for summary judgment. The decision to bar petitioners suit was apparently based entirely on the General's title and the finding that the Rod and Gun Club was an instrumentality of the United States.

Briefly stated, petitioner's efforts to obtain judicial review of an administrative action were blocked at the threshold by the District Court's application of the doctrine of sovereign immunity. The merits of the case were not considered or decided and consequently the merits are not the subject of this petition. The only issues are sovereign immunity and government officer privilege. Petitioner has been denied his day in court, without justification in law or policy.

REASONS FOR GRANTING THE WRIT

1. There Are Many Conflicts Regarding Sovereign Immunity and Its Relation to Nonstatutory Review.

Sovereign immunity is in a state of conflict in and among the circuits, and in conflict with the decisions of this Court, departing from the mainstream of precedent, resulting in arbitrary decisions and injustice.

A. The uncertain foundation of sovereign immunity and the development of nonstatutory review to escape its inequitable effects.

The doctrine of sovereign immunity is a judicially created doctrine without constitutional or statutory basis. As noted an authority as Dean Prosser has characterized it as feudal and monarchistic. W. Prosser, *Law of Torts* 971 (4th Ed. 1971). Professor Davis says of the doctrine, "One can read a hundred judicial opinions about sovereign immunity without ever encountering a reason in favor of it. Decisions based on sovereign immunity customarily rest on authority, the authority rests on history, and the history rests on medievalisms about monarchs." K. Davis, *Administrative Law Text*, § 27.02, at 497 (3rd Ed. 1972).

The courts which created this doctrine saw that it would cause injustice, in conflict with the principle that the government is not to be above the law. A solution was afforded by permitting suit to be maintained against a government officer, as distinguished from a suit against the government itself. Ex Parte Young, 209 U.S. 123 (1908); Philadelphia Co. v. Stimson, 223 U.S. 605 (1912); American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902). These decisions firmly established the rule that where a government official acted be-

yond the scope of his authority an injured individual could obtain injunctive relief, naming the officer as the defendant.

This procedure became known by a slightly inaccurate label, "nonstatutory review", meaning that the action was not based on a special statutory grant of federal jurisdiction relating to the particular officer, but rather on the general jurisdictional statutes, 28 U.S.C. § 1331, and more recently the Federal Mandamus Act, 28 U.S.C. § 1346 and the Federal Declaratory Judgment Statutes, 28 U.S.C. §§ 2201, 2202. (Appendix F) Countless aggrieved parties have obtained redress in suits based on nonstatutory review. Davis, *Administrative Law Text*, § 27.03 at 499 (3rd Ed. 1972) This procedure is recognized in Rule 25(d) of the Federal Rules of Civil Procedure. (Appendix F) It was thus with justifiable reliance on this established doctrine that petitioner sought judicial review in the instant case.

Nonstatutory review seeks an injunction to force the government officer to correctly perform his duties. All the real interests of the sovereign therefore support the citizen in his action. Land v. Dollar, 330 U.S. 731, 738 (1947). Nonstatutory review does not constitute a suit against the government itself, nor does it seek damages from the government. Properly understood, sovereign immunity is irrelevant to suits for nonstatutory review. It was erroneous to apply sovereign immunity in the present suit, since nonstatutory review was sought.

B. The unfortunate results of the Larson decision.

By the development of nonstatutory review, the courts afforded judicial review of unauthorized administrative action and substantially ameliorated the unjust effects of sovereign immunity. Davis, *Administrative Law Text*, § 27.03 (3rd Ed. 1972). Then in 1949 a decision was handed down which produced uncertainty and conflict in this area of the law. Larson

v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949). This case concerned alleged violation of a war contract at the instigation of a government official. The court held that suit against the officer was barred. The opinion in the case (1) implied that there was an outer circle of conduct which, although not authorized, might nevertheless be regarded as action of the sovereign, and (2) imported into nonstatutory review the notion that the suit was barred if the act of the officer was such that it would be imputed to the government under "the normal rules of agency."

The *Larson* opinion introduced confusion into the long line of precedent stemming from *Ex Parte Young* and *Philadelphia Co. v. Stimson, supra.* Highly unfortunate was the introduction of the law of agency into this area, where it is not merely irrelevant, but pernicious. Agency *extends* liability, in order to reach the deep pocket and insure redress. Sovereign immunity *restricts* liability, prevents redress and creates a substantial danger of injustice. Even worse, as in the present case, the *Larson* decision tends to encourage dismissal in some cases on the basis of the officer's title, without real examination of the nature of the suit. See Jaffe *Judicial Control of Administrative Action* 226-231 (1965); and Malone v. Bowdoin, 369 U.S. 643 (1962). In the present case, the lower courts made no apparent effort to deal with or justify the confusing *Larson* concepts, but merely cited *Larson* as authority for summary judgment and quit.

Following *Larson* sovereign immunity was discussed in another Supreme Court opinion, *Hawaii v. Gordon*, 373 U.S. 57 (1963). This *per curiam* opinion was too abbreviated to accomplish any clarification of the law in this area, and instead only succeeded in introducing another unfortunate phrase, applying sovereign immunity if the relief requested "would operate against the United States." 373 U.S. 57 at 57. Clearly this phrase is too broad and does not accurately re-

flect the practice of the courts, before or after the *Hawaii v. Gordon* decision.

The leading commentators have pointed out that the phrases in these cases are inaccurate formulations. An extensive study was made by Professor Roger C. Cramton (now Dean at Cornell Law School) as consultant for the Administrative Conference of the United States. In a comprehensive article published in the *Michigan Law Review*, he analyzed and pointed out the fundamental defects in the *Larson* and *Hawaii* decisions. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. Rev. 389 (1970). With regard to *Hawaii v. Gordon*, Professor Cramton stated:

> "Mandatory relief has been granted against federal officers for many years under such circumstances, and *Hawaii v. Gordon* muddies the waters by suggesting that affirmative relief is always barred by sovereign immunity." 68 Mich. L. Rev. at 415.

With respect to the *Hawaii* case, the article also quotes 3 Davis, *Administrative Law Treatise*, § 2701 at 149 (Supp. 1965):

> "This so-called general rule has never been the general rule and is not likely to become the general rule. Judgments of courts have often expended themselves on the public treasury or domain have often interfered with the public administration, and have often restrained the government from acting or compelled it to act, and judgments of courts will surely continue to do these things in the future." 68 Mich. L. Rev. at 417.

The net effect has been to confuse an area of law that need not be in doubt. The principles of nonstatutory review were developed to make judicial review available without interference

from the doctrine of sovereign immunity. Accordingly, although sovereign immunity may properly apply to some cases (such as damage suits against the government itself), it does not bar suits for nonstatutory review.

The confusing statements in the *Larson* and *Hawaii* cases are frequently merely ignored by the courts, and countless cases of nonstatutory review are decided without mention of sovereign immunity. *See*, for example, Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). But because *Larson* and *Hawaii* speak too broadly, the immunity doctrine has become a "wild card" that can be applied arbitrarily to shield unauthorized conduct. This happened to the petitioner, and it is a violation of his due process rights.

C. **There is conflict in and among the circuits concerning Sovereign Immunity and Nonstatutory Review.**

The practical result of the *Larson* decision has been arbitrary action and inconsistency. The courts, confronted on the one hand with *Larson's* unclear conception of immunity, and on the other hand the strong tradition of reviewability embodied in the countless cases allowing judicial review, have subsided into conflicting decisions based on unstated or obscure reasoning. It is true, a few suits for nonstatutory review have been dismissed with a simple reference to *Larson*, as for example, Doehla Greeting Cards v. Summerfield, 227 F.2d 44 (D.C. Cir. 1955). Other cases have distinguished or modified *Larson's* holding, as illustrated by two cases from the same circuit, *West Coast Exploration Co. v. McKay*, 213 F.2d 582 (D.C. Cir. 1954); and *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451 (D.C. Cir. 1965). In the former case *Larson* was restricted to cases where the plaintiff had failed to allege that the officer in question acted outside his authority, and in the latter *Hawaii* was *superimposed* on *Larson* to make

major determinant the nature of the relief requested. On the other hand *Larson* has been cited as authority to justify nonstatutory review and defeat sovereign immunity! Abbott Laboratories v. Gardner, 228 F.Supp. 855 (D. Del. 1964), affirmed without reference to sovereign immunity, 387 U.S. 136 (1967).

In three other decisions at the Circuit Court level, nonstatutory suits were entertained on the basis of *Philadelphia Co. v. Stimson* without any concern with the possible conflicting effects of *Larson*. Penagaricano v. Allen Corp., 267 F.2d 550 (1st Cir. 1959); Pan American Petroleum Corp. v. Pierson, 284 F. 2d 649 (10th Cir. 1960); Toilet Goods Association v. Gardner, 360 F.2d 677 (2nd Cir. 1966) *affirmed as companion case to Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). These are only an illustrative sampling of cases similarly decided.

A recent decision in the Fourth Circuit, *Littell v. Morton*, 445 F.2d 1207 (4th Cir. 1971), clearly demonstrates the conflicting nature of present authority concerning nonstatutory review and sovereign immunity. In that case, although the court found a *Larson-type* situation, it noted that sovereign immunity was a doctrine in great disfavor with commentators and courts, and recognizing the confused state of the law, it refused to give authority to *Larson*. The court said, "Against a weakening of general faith in the validity of the doctrine, we are persuaded that the justifications for the doctrine are not compelling here." (445 F.2d at 1214) This decision alone would seem to demonstrate a serious conflict in the Circuits. The court also said in *Littell v. Morton:*

> "It must be recognized at the outset that an effort to establish legal consistency in the decisions dealing with sovereign immunity is bound to be frustrating. The authorities are not reconcilable, and there are conceptual conflicts in the various holdings with which an intermediate appellate court must grapple." (445 F.2d at 1211-1212)

In another post-*Larson* decision concerning sovereign immunity and nonstatutory review, it was stated:

> "We shall not attempt to support this conclusion by undertaking to distill from the cases a verbal formula or rule designed for general application. Even a cursory examination of the authorities shows the futility of venturing in that direction." Penagaricano v. Allen Corp., 267 F.2d 550 at 554 (1st Cir. 1959).

Now, more than twenty years after the *Larson* decision, the circuits must still grope for guidance concerning sovereign immunity and nonstatutory review. Clarification is sorely needed.

D. Application of sovereign immunity to bar nonstatutory review is in conflict with decisions of this Court.

Where sovereign immunity is applied to a suit for nonstatutory judicial review of administrative action, it is in direct conflict with this Court's clear pronouncement in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), where the presumption of judicial review was expressly declared. It was further stated in *Abbott* that ". . . a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." 387 U.S. at 140. In *Harmon v. Brucker*, 355 U.S. 579 (1958), this Court held that a suit against the Secretary of the Army was cognizable where the Secretary had wrongfully issued dishonorable discharges. The Court there said: "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express and implied powers." (355 U.S. at 581, 582)

And in the case of *Vitarelli v. Seaton*, 359 U.S. 535 (1959), this Court allowed a suit against the Secretary of the Army for

reinstatement with back pay of a wrongfully discharged federal employee. The *Vitarelli* decision is almost precisely on all fours with the facts of the instant case, and in that case nonstatutory review was allowed as a matter of course.

The *Vitarelli* decision, and the other pronouncements of this Court clearly establish the availability of judicial review of administrative actions. The District Court should have followed these precedents and sovereign immunity should not have been applied. Instead, in the present case, the lower courts held contrary to these precedents without recognizing or facing them.

E. Application of sovereign immunity as a bar to nonstatutory review is a violation of the due process clause of the Fifth Amendment.

In the present conflicting situation, many cases are heard under the doctrine of nonstatutory review without mention of *Larson* or sovereign immunity (*e.g. Vitarelli v. Seaton* and *Abbott Laboratories v. Gardner*, discussed *supra*), and others are dismissed under the holding of *Larson* with scarce recognition of the presumption in favor of review (*e.g. Malone v. Bowdoin*, 369 U.S. 643 (1962)). There is no consistency, no rational formulation of law governing the decision whether sovereign immunity should apply; application is arbitrary and unreasoned. The effect of this judicially created doctrine is therefore to deprive petitioner and similar parties of their rights to *substantive* due process, to be free from arbitrary destruction of their personal and property rights at the hands of government. *See* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951).

The application of sovereign immunity also operates to deprive parties of their rights to *procedural* due process. As in the instant case, individuals may have personal and property rights infringed without receiving the essential due process require-

ment of a hearing. Their day in court may be precluded at the threshold. The correction of such unjust treatment has been of paramount importance to this Court in recent decisions, see for example, Goldberg v. Kelly, 397 U.S. 254 (1970).

The deprivation of both substantive and procedural due process rights which now result from the application of sovereign immunity to cases of nonstatutory review, brings constitional imperative to the need for clarification and correction.

F. A reasoned statement of law is needed to prevent the unjust "wild card" application of sovereign immunity to nonstatutory review.

If in some cases there is reason to deny judicial review, a rational decision can be made by the courts without sovereign immunity. The doctrine of non-justiciability is available if the facts for good reason warrant an exercise of judicial self-restraint. The cases regarding political questions, the abstention doctrine, and primary jurisdiction, illustrate the historic practices. Under Due Process concepts, the interests that are involved should be weighed to determine whether the case ought to be heard. Goldberg v. Kelly, 397 U.S. 254 (1970). Sovereign immunity adds nothing useful, but instead, if applied as it was in the present case, prevents inquiry into facts and frustrates reasoned decision, closing the courthouse door without basing the decision on fact or policy.

The issue presented here concerns sovereign immunity only in suits for nonstatutory review, *i. e.*, declaratory and injunctive relief against unauthorized acts of a government official. The United States is not the defendant. No claim is made for damages against the United States. Correction of unauthorized action is the goal. In this type of suit, sovereign immunity has no place. It is an unreasoned doctrine that excludes the courts

from performing the necessary and proper function of reviewing administrative action. If review is to be barred, the decision should be grounded on a determination of facts and policy. Petitioner believes that the Fort Knox Rod and Gun Club does not involve the kind of important government interests that would outweigh his request for judicial consideration. The District Court should at least have allowed an inquiry and considered the interests that would be affected.

The real concern is whether there are valid reasons for denying judicial review, and this requires an inquiry into the interests of government that are involved. This was recognized in *Littell v. Morton*, 445 F.2d 1207 (4th Cir. 1971), where sovereign immunity was abandoned in favor of a reasoned decision on the facts to decide whether suit should be entertained.

This approach would not require a repudiation of all cases where suit was barred in the past. A consideration of the facts and interests might well haev shown in the *Larson* and *Hawaii* cases that important government interests outweighed the interests of the plaintiffs. The needed advance in the law is to base decisions on reasoning and facts, not on a blindfolded, unreasoned bar at the threshold, not on vague language which is often ignored or unpredictably applied. The facts should be considered in deciding whether or not governmental "interests" involved should be protected. Summary judgment based on sovereign immunity results in no consideration of the real merits of protecting governmental interests—it is an oversimplified categorical rejection of the case without reasoning.

G. Sovereign Immunity in Judicial Review has been widely disapproved. Reform is strongly recommended.

> "A single, well considered opinion could do about all that is needed to straighten out the fundamental Law." K. Davis, *Administrative Law Text*, § 2707 (3rd Ed. 1972).

The Administrative Conference of the United States and the American Bar Association support the abolition of sovereign immunity in judicial review. See Littell v. Morton, *supra*, at 1214; Recommendation 9 of the Administrative Conference of the United States adopted October 21, 1969, 38 U.S.L.W. 2242 (1969).

Professor Cramton in his comprehensive study states:

> "No scholar, so far as can be ascertained, has had a good word for sovereign immunity for many years."

Among the authorities opposed to the doctrine, he lists Gellhorn, Jaffee, Byse, Carrow, and of course, Davis. He cites numerous recommendations for abolition and reform which have been proposed by this "unanimity of legal scholarship." (Cramton, *supra*, 68 Mich. L. Rev. at 419)

2. The Administrative Procedure Act Has Been Construed as a Waiver of Sovereign Immunity by Some Circuits, Creating a Conflict Among the Circuits.

Courts have held that the Administrative Procedure Act constitutes a waiver of sovereign immunity. These holdings have avoided the injustice of arbitrarily applied immunity, but in doing so have precipitated a sharply defined conflict among the Federal Circuits.

All sections of the A.P.A. indicate that judicial review is to be available to aggrieved parties. (5 U.S.C. § 701-706 (Appendix F).) In particular, section 10(a) of the A.P.A., 5 U.S.C. § 702, contains language reasonably constituting a statutory waiver in suits for nonstatutory review of administrative action. Commentators point out:

"The Supreme Court could eliminate the sovereign immunity problem in judicial review of Federal administrative action by a swift stroke of the pen. All that would be required is a holding

that § 10(a) of the Administrative Procedure Act *as amended*, 5 U.S.C.A. § 702 (Supp. IV 1965-1968), means what it says: 'A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.'" *Cramton, supra*, 68 *Mich. L. Rev.* at 417-418, n. 143 (1970).

"The logic of this argument is persuasive; an elaborate system created by Congress to provide judicial review of federal administrative action is, by its very nature, inconsistent with a doctrine that denied such review absent Congressional consent to suit." Note, *Nonstatutory Review of Federal Agency Action: A New Approach to Sovereign Immunity*, 24 Me. L. Rev. 123, 130 (1972).

Two circuits have held that this section of the A.P.A. constitutes a waiver of the sovereign immunity defense. Scanwell Laboratories, Inc. v. Shaffer, 424 F. 2d 873 (D.C. Cir. 1970); Kletschka v. Driver, 411 F.2d 436 (2nd Cir. 1969).

Two other Circuits at one time held that it did but have now modified their positions. Adams v. Witmer, 271 F. 2d 29 (9th Cir. 1958) and the later case Washington v. Udall, 417 F. 2d 1310 (9th Cir. 1969); Estrada v. Ahrens, 296 F.2d 690 (5th Cir. 1961) and the later case Colson v. Hickel, 428 F.2d 1046 *cert. denied* (5th Cir. 1970).

Five of the Circuits have held that the A.P.A. does not constitute a waiver of the immunity. Motah v. United States, 402 F.2d 1 (10th Cir. 1968); Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967); Cyrus v. United States, 226 F.2d 416 (1st Cir. 1955); Zimmerman v. United States Government, 422 F.2d 326 (3rd Cir. 1970); Railway Express Agency, Inc. v. Kennedy, 189 F.2d 801 (7th Cir. 1951).

The position of the 4th Circuit is undecided, because in *Littell v. Morton, supra*, that court formulated a revised con-

cept of the doctrine. The *Littell* discussion of the confused state of the law is in point concerning the effect of the Administrative Procedure Act:

> "Our task is magnified because we have been unable to find any case in which the Supreme Court has sought to reconcile the notion of sovereign immunity with the fundamental concept of the A.P.A. that a person adversely affected by administrative action is presumptively entitled to judicial review of its correctness." 445 F.2d at 1212.

The Administrative Procedure Act does not mention sovereign immunity, most probably because the draftsmen believed that the law was clear that immunity would not apply to nonstatutory review. Final Report of the Attorney General's Committee on Administrative Procedure, Sen.Doc. No. 8, 77 Cong. 1st Sess. at 80, 81 (1941).

Recognition that the Administrative Procedure Act constitutes an expression of the intent that sovereign immunity does not apply to nonstatutory review would resolve this case and achieve rationality in this presently confused area of the law. A holding that the Act constitutes a waiver would avoid the underlying issues of sovereign immunity, and the waiver would control.

3. The Government Officer's Individual Privilege Should Be Based on Examination of the Facts of the Case.

This case also includes a claim against General Desobry personally for damages. Petitioner recognizes that the interests of government appear to require that officers be shielded to some extent from personal liability for their unauthorized acts. Barr v. Mateo, 360 U.S. 564 (1961). On the other hand, this protection is limited. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). In order to decide whether a particular act is within the scope of the government officer's

privilege, the court must have facts concerning the officer's position, the governmental interests involved, and the nature of the officer's actions. The remand of the *Bivens* case illustrates further the need for an inquiry into the facts. 456 F.2d 1339 (2nd Cir. 1972). Such inquiry was not made in Petitioner's case, thus summary judgment was improper.

The law has not yet reached the point where general principles can be formulated to describe the boundaries of the government officer's privilege. Most probably a gradual case-by-case development is to take place. In any event, *Bivens* has made it clear that such cases are to be decided on facts and not merely dismissed because of the "khaki curtain" involvement of an Army general. In seeking remand of this case for a decision on the facts, petitioner believes that the law expressed in *Bivens* can be reinforced so that other plaintiffs as well as petitioner will be judged on the facts and the merits, and not erroneously or summarily barred.

CONCLUSION

Plaintiff seeks his day in court. His Constitutional and administrative rights although violated have not been conceded in any court. The conflict and injustice that occurs when non-statutory review collides with sovereign immunity needs correction, so that citizens will be governed by law that is reasoned and just. For these reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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